



**CONSTITUTIONAL COURT
REPUBLIC OF INDONESIA**

**JUDGMENT SUMMARY OF
CASE NUMBER 10/PUU-XIX/2021**

Regarding

**Legal Consequences Against Mortgage Providers (Debtors) Who Commit Breach of
Contract or are Bankrupt**

Applicant : **Sri-Bintang Pamungkas**

Case Type : Judicial Review of Law Number 4 of 1996 on Mortgage Rights on
Land and Objects Related to Land (UU 4/1996) to the 1945
Constitution of the Republic of Indonesia (UUD 1945)

Merits of Case : Judicial Review of Article 6, Article 14 paragraph (3), Article 20
paragraph (1) and paragraph (2) as well as Article 21 of Law
6/1996 against Article 1 paragraph (3), Article 24, Article 27
paragraph (1) and paragraph (2) and Article 29 paragraph (1) of
the 1945 Constitution

Judgment : Rejecting the Applicant's request in its entirety.

Judgment Date : Tuesday, August 31st, 2021

Judgment Summary

The Applicant is an individual Indonesian citizen as the provider of mortgage rights in the form of the Applicant's house which is used as collateral to borrow money at the Bank by the Applicant's partner (Debtor);

With regard to the authority of the Court, since the Applicant's request is reviewing Article 6, Article 14 paragraph (3), Article 20 paragraph (1) and paragraph (2) and Article 21 of Law 6/1996 against the 1945 Constitution, the Court has the authority to hear the Applicant's request;

In relation to the legal position of the Applicant, that in essence the Applicant argues that the Applicant as the holder of the mortgage right of the Applicant's house located at Bukit Permai Cibubur Housing, Jalan Merapi D-1 as collateral by the Applicant's partner to borrow money at BCA that will be auctioned by BCA on the basis of Article 6 , Article 14 paragraph (3), Article 20 paragraph (1) and paragraph (2) as well as Article 21 of Law 4/1996, the auction has harmed the constitutional rights of the Applicant with the main reason that these Articles are the nature of the Creditor's outrage intentionally given by the state, so that the Creditor acts arbitrarily to the Debtor. Likewise, the position of the Bank as a lender is equal to that of the Supreme Court so that the Applicant does not have the opportunity to take legal action when the Applicant's house is auctioned. Furthermore, according to the Applicant, the auction of the Applicant's house which is immediately conducted by the Bank is very detrimental to the Applicant because at any time the Applicant and his family may be evicted from their house. Moreover, according to the Applicant, the phrase "underhand" in the provisions of Article 20 paragraph (2) means "by secret" or "not openly" meaning that the auction does not benefit all parties because the highest price from the Applicant's house auction is the result of engineering from the mortgage holder (Bank). Thus, because of the scalable power of the mortgage holder (creditor), the mortgagee no longer has the power to

defend himself. Whereas from the Applicant's argument, regardless of whether or not the Applicants' argument is proven regarding the conflict of norms in the *a quo* articles to the 1945 Constitution, according to the Court, the Applicants have been able to describe specifically the existence of a *causal verband* (casualty) that with the enactment of the norms of Article 6, Article 14 paragraph (3), Article 20 paragraph (1) and paragraph (2) as well as Article 21 of Law 4/1996 are considered detrimental to the Applicant as an individual Indonesian citizen who is facing problems with BCA because the house is used as collateral to borrow money at BCA by the Debtor (a partner of the Applicant) will be auctioned by relying on the articles tested by the Applicant because the debtor has defaulted or committed breach of contract. Therefore, the Court has the opinion that the Applicant has specifically explained the perceived loss of his constitutional rights that occurred with the enactment of the legal norms proposed for review. Thus, the Applicant has legal standing to act as the Applicant in the *a quo* request;

Whereas because the *a quo* request is clear, the Court has the opinion that there is neither urgency nor need to hear the statements of the parties as referred to in Article 54 of the Constitutional Court Law;

In relation to the principal of the Applicant's request, in essence the Applicant argues that Article 6, Article 14 paragraph (3), Article 20 paragraph (1) and paragraph (2) and Article 21 of Law 4/1996 have discriminated against the Applicant because the bank as the holder of the mortgage has ruled out the position of the Debtor. Legal protection is also given excessively to the mortgage holder (creditor) and ignores the legal protection to the debtor (the mortgage provider). Likewise, the executive rights of mortgage holders by means of public auctions are inhumane, because they should have been completed before the auction process through the principle of kinship and deliberation for consensus. Against the Applicant's argument, the Court has the opinion as follows:

1. Whereas with respect to Article 6 of Law 4/1996, based on Court Judgment Number 21/PUU-XVIII/2020 dated August 27th, 2020, the Court has explicitly outlined the principles, characteristics and nature of mortgage rights, it is universally clear that the essence of Mortgage Rights is a security right on land for the settlement of certain debts, which gives priority to certain creditors (who have different positions in accordance with the provisions of the mortgage law) against other creditors. Therefore, financial institutions such as banks that provide credit loan facilities to debtors are also creditors who are full of risk, so banks are required to apply risk management and methodologies by managing or mitigating these risks, namely by identifying, measuring, monitoring, and controlling risks arising from all bank business activities. Whereas at the stage of execution of the auction the district court or the auction office at the request of the creditor holding the mortgage must also fulfill the stages as determined by the laws and regulations. Even the debtor can make an agreement with creditor to sell the collateral privately, as long as the highest price that benefits the parties is obtained (see Article 20 paragraph (2) of Law 4/1996). Therefore, without the intention of assessing the concrete case experienced by the Applicant, if there are problems in the auction process experienced by the Applicant as a guarantor in the credit agreement between the debtor and creditor as described by the Applicant in the argument of his request, in particular the existence of arbitrariness, then according to the Court, this is not a matter of the unconstitutionality of the norms of Article 6 of Law 4/1996, but it is related to the implementation at the level of practice which is not within the authority of the Constitutional Court to judge it.
2. Whereas with respect to Article 14 paragraph (3) of Law 4/1996, the Court has also considered quite clearly in the Court's Judgment Number 21/PUUXVIII/2020 dated August 27th, 2020 that in the execution of the auction, the mortgagee cannot directly carry

out the auction of the object of mortgage if the debtor defaults. All auction executions must go through a process that has been known by both parties in advance as considered by the Court and preceded by providing sufficient opportunities for debtors to fulfill their achievements. In fact, the debtor and creditor can agree to make a sale under the hand, if against this the highest price will be obtained and benefit all parties. Meanwhile, the Applicants' argument which states that the phrase "executory power" and the phrase "equal to a court judgment that has permanent legal force" only provides legal protection to creditors and is not in accordance with state law. In this regard, the Court has the opinion that the provisions in Article 14 paragraph (3) of Law 4/1996 are actually a juridical consequence of the nature of the mortgage agreement which has executive power and is equated with a court judgment which has permanent legal force. Therefore, the specificity possessed by the mortgage has become the common desire of the parties involved in the agreement which is the implementation of the principle of freedom of contract as the will of the parties in actualizing their private rights protected by law, even the constitution, as long as they do not conflict with law, decency and public order (see Article 1320 of the Civil Code). Therefore, the existence of a voluntary agreement as outlined in the agreement as considered by the Court becomes a law that has binding power for the parties who make it (*Pacta sunt servanda* Article 1338 of the Civil Code).

3. Whereas Article 20 paragraph (1) of Law 4/1996 which is also based on the Constitutional Court Judgment Number 21/PUU-XVIII/2020 dated August 27th, 2020 has confirmed that the auction execution of the mortgage object is not carried out suddenly or abruptly by the mortgage holder (creditor). The auction execution of the mortgage object as mandated by the norm of Article 20 paragraph (1) of Law 4/1996 has determined that the sale of the mortgage object is carried out if the mortgage provider/debtor defaults or breaks his promise to the credit agreement. Therefore, the consequences of the auction of the

mortgage object must have been known by both parties, namely the creditor and the debtor which was stated and agreed upon in the credit agreement by all parties from the start. Therefore, it is precisely with the auction in general and carried out in a transparent manner that the highest bid price will be obtained for the object of mortgage. Thus, both the creditor and the debtor will not experience a loss and will even get a profit, namely for the creditor getting the repayment of the bad debt and the debtor getting the remainder from the auction proceeds for the mortgage object. Moreover, the law also provides an opportunity for debtors and creditors to agree that the object of mortgage is sold privately if the highest price is obtained and benefits all parties [see Article 20 paragraph (2) of Law 4/1996]. Likewise, Article 20 paragraph (2) of Law 4/1996 according to the Court in the Elucidation of Article 20 paragraph (2) of Law 4/1996 has very clearly determined as follows, "In the event that sales through public auctions are not expected to produce the highest price, by deviating of the principle as referred to in paragraph (1) it is given the possibility of carrying out execution through privately sales, provided that it is agreed upon by the provider and the holder of the Mortgage, and the conditions specified in paragraph (3) are met. This possibility is intended to accelerate the sale of the Mortgage object with the highest selling price." Based on the Elucidation of Article 20 paragraph (2) of Law 4/1996, it is actually very clear that the sale of the mortgaged object by means of an underhand method can be carried out if there is an agreement between the provider and the recipient/holder of the mortgage and as long as the highest price is obtained and benefits the parties.

4. Whereas with regard to Article 21 of Law 4/1996, according to the Court, the essence that can be obtained from this provision is that there is a debtor providing mortgages who is declared bankrupt and creditors receiving mortgages do not lose their right to continue taking legal action against the object of the mortgage. In this regard, the Court considers

that, as the nature of the creditor receiving or the holder of the mortgage, is privileged, as a separatist creditor. Therefore, the existence of a court judgment stating that the debtor is in a state of bankruptcy will not eliminate the right of the creditor holding the mortgage to lose the rights attached to the settlement of the debtor's debt to the creditor. Because, in accordance with their nature, creditors holding mortgages are separatist creditors who have the right to take precedence (privilege), then when the curator as the party conducting the verification or settlement of all bankrupt assets including the object of mortgage that has been burdened with the title of executive power must be issued and is no longer part of the bankruptcy estate (*boedel*) which is being settled for the fulfillment of the debts of other creditors. Thus, it is clear that with regard to the legal protection of the creditor holding the mortgage against the debtor giving the mortgage who is declared bankrupt, his right to continue to receive guarantees for the fulfillment of his receivables from the debtor even though the debtor is declared bankrupt will not be disturbed.

Based on the considerations as described above, the Court handed down a judgment which rejected the Applicant's request in its entirety.